Supreme Court of the United States

OCTOBER TERM, 1943

No. 537

KERSH LAKE DRAINAGE DISTRICT, *Petitioner,*

v.

STATE BANK & TRUST COMPANY OF WELLSTON, MISSOURI, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PARAGON PRINTING CO., LITTLE ROCK

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Kersh Lake Drainage District, is a drainage district organized under the laws of the State of Arkansas, and it petitions this court for a writ of certiorari to the United States Circuit Court of Appeals for the

Eighth Circuit, to review a final decree of that court affirming an order of the district court denying a motion to dissolve an injunction and to dismiss the case for want of jurisdiction of the district court, as a court of equity, of the subject matter of the suit.

The decision of the Circuit Court of Appeals holds in effect: (a) That the district court, as a court of equity, has jurisdiction of the subject matter of the levying, extension, collection and distribution of taxes in a drainage district in Arkansas; (b) that the district court, as a court of equity, had jurisdiction to levy a tax of 6½% per annum on the assessed benefits against each tract of land in the district to be applied in satisfaction of a judgment against the district; and (c) that a state statute, Act 46 of 1933, conferred jurisdiction on the district court to issue a mandatory injunction: (1) requiring the county clerks of the three counties in which the drainage district is situated to extend the tax levied by the court on the tax books of their respective counties; (2) to require the sheriff in each of the counties to collect the tax and pay the proceeds into the registry of the court; (3) to appoint the commissioners of the district as receivers of the court and make them subject to the control of the court; and (4) to enjoin the commissioners from paying out any of the funds of the district except on the order of the court.

Your petitioner contends that a federal court, as a court of equity, is wholly without jurisdiction of the subject matter of the levying, extension, collecting and distribution of taxes, and that a state statute cannot enlarge the equity jurisdiction of a federal court in that respect.

I

Summary statement of the case.

On November 1, 1935, the State Bank & Trust Company recovered a decree for $54,655.00 against the Kersh Lake Drainage District in the District Court for the Western Division of the Eastern District of Arkansas. This decree was affirmed on appeal.

Kersh Lake Drainage District v. *State Bank & Trust Company,* 8 C. C. A., 85 Fed. (2nd) 643.

On January 4, 1936, the Bank filed a complaint against the district on the equity side of the same court, in which it alleged that the commissioners of the district had refused to extend and collect taxes to pay the judgment on the ground that the assessed benefits had been exhausted, but that Act 467 of 1919 made benefits bear interest, and that this interest was taxable. The prayer was for a mandatory injunction requiring the taxing officers to extend a tax of 6½% per annum on the benefits, and that the commissioners, as receivers of the court, be required to collect this tax until sufficient funds were realized to pay the Bank's judgment.

The district court held that Act 467 applied to the Kersh Lake Drainage District, though that district was organized before the passage of the act. It thereupon rendered the following decree:

"It Is Therefore Considered, Ordered and Decreed that a mandatory injunction issue requiring the defendant County Clerks, N. M. Ryall and N. D. Newton, to extend upon the tax books of their respective

counties a tax of six and one-half per cent of the benefits assessed against each tract of land, railroad and tramroad in the district for each of the years 1926 and the following years until the whole of this decree has been satisfied, and that the said W. A. Dodds, as collector of Lincoln County, and H. L. Clayton, Collector of Desha County, be required to collect said drainage tax along with the County and State taxes, and to pay the same over to the Clerk of this Court until the sums hereinbefore mentioned have been paid to the plaintiff and to the interveners.

"It Is Further Considered, Ordered and Decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes; and the said commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.

"It Is Further Ordered that the said defendant commissioners pay out none of the funds of said district without an order of this court authorizing them to do so."

(Rec. page 10.)

This decree was affirmed on appeal.

Kersh Lake Drainage District v. *State Bank & Trust Company*, 8 C. C. A., 92 Fed. (2nd) 783.

The only issue raised in the district court or in the Court of Appeals was whether or not Act 467 applied to this district which was organized before its passage. The question of the jurisdiction of the district court, as a court of equity, to levy a tax, and to appoint receivers to collect it, was not raised or decided either in the district court or in the Court of Appeals.

Following the affirmance of the decree the district court from time to time made numerous interlocutory orders which were wholly beyond the power of the court, and which were adverse to the interests of the district and of its landowners. The district, however, was helpless with respect to these orders, for they were not final judgments and no appeals could be taken from them.

Finally, the district filed a motion to dismiss the case on the ground that the district court, as a court of equity, was without jurisdiction of the subject matter of the suit. The motion was denied, and the district appealed.

The Court of Appeals affirmed. The court said:

> "It is apparent that the object of the motion of the district involved in this appeal is to obtain a rehearing in this court of our decision in *Kersh Lake Drainage District* v. *State Bank & Trust Co.*, 92 Fed. (2nd) 783. * * * The judges constituting the court to which this appeal is presented are not the same as those who heard the first appeal. Therefore the decision of 1937 affirming the decree in its entirety is binding upon us and will be adhered to."

The question of jurisdiction of the subject matter of the suit was not raised or decided on the former appeal. The petitioner contends that an objection to the jurisdiction of a federal court, as a court of equity, of the sub-

ject matter of the suit may be made at any stage of the proceeding until it is finally decided.

The Court of Appeals held that state Act No. 46 of 1933 enlarged the equity jurisdiction of federal courts in Arkansas, and empowered the district court to make the orders reflected by the record in this case.

II

Questions presented.

(1) Whether a federal court, as a court of equity, has jurisdiction to levy or collect taxes.

(2) Whether a federal court, as a court of equity, has jurisdiction to appoint receivers for a drainage district in Arkansas.

(3) Whether Act 46 of 1933 enlarged the equity jurisdiction of federal courts in Arkansas.

III

Reasons relied on for the allowance of the writ.

(a) The decision of the Court of Appeals that a federal court, as a court of equity, has the power to levy and collect taxes is contrary to the applicable decisions of this court.

(b) Under section 129 of the Judicial Code the Court of Appeals had the power, and it was its duty, to determine whether or not the district court, as a court of equity, had jurisdiction of the subject matter of this suit.

(c) A state legislative act cannot enlarge the equity jurisdiction of federal courts, nor can it obliterate the distinction between law and equity in such courts.

(d) The decision of the Court of Appeals that Act 46 of 1933 empowered the district court to appoint receivers for this drainage district, and to issue the mandatory injunctional orders involved in this case, is contrary to the applicable decisions of this court.

(e) The Circuit Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

IV

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court a full and complete transcript of the record in the proceedings of that court in *Kersh Lake Drainage District v. State Bank & Trust Company*, No. 12,593, to the end that this case may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment of the United States Circuit Court of Appeals be reversed by this court, and for such further relief as to the court may seem proper.

Dated this 15th day of November, 1943.

CHARLES T. COLEMAN,
BURK MANN,
RICHARD B. McCULLOCH,
SHIELDS M. GOODWIN,
Counsel for Petitioner.

POINTS AND AUTHORITIES RELIED ON

I

Under Section 129 of the Judicial Code, 28 U. S. C. A. *section* 227, *this court has the power to determine whether or not the district court, as a court of equity, had jurisdiction of the subject matter of this suit.*

Denver v. *New York Trust Company,* 229 U. S. 123;

Smith v. *Vulcan Iron Works,* 165 U. S. 518;

Meccano v. *John Wanamaker,* 253 U. S. 136;

Deckart v. *Independent Shares Corporation,* 311 U. S. 282, 61 Sup. Ct. 229.

II

A federal court, as a court of equity, is without power to levy a tax.

Meriwether v. *Garrett,* 102 U. S. 515;

Heine v. *Levee Commissioners,* 19 Wall. 655;

Rees v. *City of Watertown,* 19 Wall. 107;

Thompson v. *Allen County,* 115 U. S. 550;

Yost v. *Dallas County,* 236 U. S. 50.

III

A federal court, as a court of equity, is without power to collect a tax already levied.

Thompson v. *Allen County,* 115 U. S. 550;

Street Grading District v. *Hagadorn,* 8 C. C. A., 186 Fed. 451;

Johnson v. *Riverland Levee District,* 8 C. C. A., 117 Fed. (2nd) 711.

IV

Want of jurisdiction of the district court, as a court of equity, of the subject matter of the suit cannot be waived.

Lewis v. *Cocks,* 23 Wall. 466;

Brown v. *Lake Superior Iron Company,* 134 U. S. 530;

United States v. *Corrick,* 298 U. S. 435, 56 Sup. Ct. 829;

Street Grading District v. *Hagadorn,* 8 C. C. A., 186 Fed. 451;

Hagadorn v. *Street Grading District,* 223 U. S. 721;

Cutler v. *Roe,* 7 How. 729;

Morris v. *Gilman,* 129 U. S. 315;

Federal Rules of Civil Procedure, Rule XII, subdivision (h);

1 Edmunds' Federal Rules of Civil Procedure, page 604.

V

The district court, as a court of equity, was without power to appoint receivers to collect the drainage taxes in this case.

Heine v. *Levee Commissioners*, 19 Wall. 655;

Rees v. *Watertown*, 19 Wall. 107;

Meriwether v. *Garrett*, 102 U. S. 472;

Thompson v. *Allen County*, 115 U. S. 550;

Street Grading District v. *Hagadorn*, 8 C. C. A., 186 Fed. 451;

Johnson v. *Riverland Levee District*, 8 C. C. A., 117 Fed. (2nd) 711;

Guardian Savings & Trust Company v. *Road Improvement District*, 267 U. S. 1, 45 Sup. Ct. 201;

Drainage District v. *Mercantile-Commerce Bank & Trust Company*, 8 C. C. A., 69 Fed. (2nd) 138;

Mercantile-Commerce Bank & Trust Company v. *Drainage District*, 293 U. S. 566, 55 Sup. Ct. 77;

Arkansas-Louisiana Highway Improvement District v. *Pickens*, 169 Ark. 603, 276 S. W. 355;

Dickinson v. *Mingea*, 191 Ark. 946, 88 S. W. (2nd) 807;

Rogers Paving Improvement District v. *Swofford*, 193 Ark. 260, 99 S. W. (2nd) 577;

Spellings v. *Dewey*, 8 C. C. A., 122 Fed. (2nd) 652;

Act 46, Acts of 1933, page 126;

Act 279 of 1909, section 7.

VI

A state statute cannot enlarge the equity jurisdiction of the federal courts, or obliterate the distinction between law and equity in such courts.

Judicial Code, section 267;

Pusey & Jones v. *Hanssen*, 261 U. S. 491, 43 Sup. Ct. 454;

Whitehead v. *Shaddock*, 138 U. S. 146;

Kelleam v. *Maryland Casualty Company*, 321 U. S. 377, 61 Sup. Ct. 595;

Sun Oil Company v. *Burford*, 5 C. C. A., 130 Fed. (2nd) 10;

Hollins v. *Brierfield Coal & Iron Company*, 150 U. S. 371;

Johnson v. *Riverland Levee District*, 8 C. C. A., 117 Fed. (2nd) 711;

Guardian Savings Company v. *Road District*, 267 U. S. 1.

Supreme Court of the United States

No.....

KERSH LAKE DRAINAGE DISTRICT,.....*Petitioner,*

v.

STATE BANK & TRUST COMPANY
OF WELLSTON, MISSOURI,.....*Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals for the Eighth Circuit has not been officially reported, but it appears in the record at page 52.

The date of the decree to be reviewed is October 26, 1943, and the date of the order denying a petition for a rehearing is November 9, 1943.

The jurisdiction of this court is invoked under the act of Congress of February 13, 1925, Ch. 229, 43 Statutes 936, 237 B. of the Judicial Code, section 240, 28 U. S. C. A. section 347, relating to the issuance of writs of certiorari to bring up for review judgments of the Circuit Courts of Appeals.

A concise statement of the case appears in the preceding petition, which is hereby adopted and made a part of this brief.

Argument.

By its decree in this case the district court, as a court of equity, ordered the county clerks of the three counties in which the drainage district was located "to extend upon the tax books of their respective counties a tax of six and one-half per cent of the benefits against each tract of land, railroad and tramroad in the district for each of the years 1936 and the following years until the whole of this decree has been satisfied"; ordered the sheriffs in the three counties "to collect said drainage taxes along with the county and state taxes, and to pay the same over to the clerk of this court"; ordered that the commissioners be "deemed receivers of this court", and that they "institute suits for the collection of all delinquent taxes", and "pay out none of the funds of the district without an order of this court authorizing them to do so."

The decree gave the exact relief that was prayed for in the complaint. It is thus shown that the subject matter of the suit was the levying, extension, collection and disbursement of taxes.

The subject matter of the suit, therefore, was not within the jurisdiction of a federal court as a court of equity.

I

Under section 129 of the Judicial Code, 28 U. S. C. A. section 227, this court has the power to determine whether or not the district court, as a court of equity, had jurisdiction of the subject matter of this suit.

The district court denied a motion to dismiss the case for want of jurisdiction of the court, as a court of equity, of

the subject matter of the suit. An appeal was taken under section 129 of the Judicial Code. The Court of Appeals affirmed. This court has the power to determine the important jurisdictional question involved.

> "Our power of review, like that of the Circuit Court of Appeals, is not confined to the act of granting the injunctions, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of either bill, and, if so, to directing a final decree dismissing it."

Denver v. *New York Trust Company*, 229 U. S. 123.

See also:

Meccano v. *John Wanamaker*, 253 U. S. 136;

Smith v. *Vulcan Iron Works*, 165 U. S. 518;

Deckart v. *Independent Shares Corporation*, 311 U. S. 282, 61 Sup. Ct. 229.

II

A federal court, as a court of equity, is without power to levy a tax.

The federal courts, whether of law or of equity, are inherently without power to levy taxes.

> "The levying of taxes is not a judicial act. It has no elements of one. * * * In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. * * * Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

Meriwether v. *Garrett*, 102 U. S. 515.

"The power must be derived from the legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. * * * It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government."

Heine v. *Levee Commissioners,* 19 Wall. 655.

See also:

Rees v. *City of Watertown,* 19 Wall. 107;

Thompson v. *Allen County,* 115 U. S. 550;

Yost v. *Dallas County,* 236 U. S. 50.

III

A federal court, as a court of equity, is without power to collect a tax already levied.

If the drainage taxes had already been levied by the district taxing authorities, the district court, as a court of equity, was without jurisdiction to collect them.

"We see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes."

Thompson v. *Allen County,* 115 U. S. 550.

See also:

Street Grading District v. *Hagadorn,* 8 C. C. A., 186 Fed. 451;

Johnson v. *Riverland Levee District,* 8 C. C. A., 117 Fed. (2nd) 711).

IV

Want of jurisdiction of the district court, as a court of equity, of the subject matter of the suit could not be waived.

The Court of Appeals held that as the question of the jurisdiction of the district court, as a court of equity, of the subject matter of the suit could have been raised, but was not raised, on the first appeal of the case, it could not be considered on the second appeal. The court said:

> "Though the particular arguments against the decree which are made upon the motion were not presented on the former appeal, the district appellant in both appeals had its full opportunity to raise the points the first time."

If a suit belongs to a class over which a court of equity has general jurisdiction, the failure of the plaintiff to do something which conditions the exercise of such general jurisdiction in the particular case, such as obtaining a judgment before filing a creditor's bill, can be waived, and is waived unless timely objection is interposed. The existence of an adequate remedy at law can likewise be waived. But a want of jurisdiction of the subject matter of the suit is not the subject of waiver.

The petitioner may have been derelict in failing to raise the question of the want of jurisdiction of the subject matter of the suit on the first appeal. Even so, the Court of Appeals was equally derelict in failing to explore the question of jurisdiction on its own motion.

> "In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by

counsel, nevertheless if it clearly exists it is the duty of the court sua sponte to recognize it and give it effect."

Lewis v. *Cocks,* 23 Wall. 466.

In holding that certain prerequisites to the exercise of the general jurisdiction of a court of equity may be waived, this court was careful to make the following reservation:

"The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter."

Brown v. *Lake Superior Iron Company,* 134 U. S. 530.

In a comparatively recent case this court said:

"The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte to proceed in the cause. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it."

United States v. *Corrick,* 298 U. S. 435, 56 Sup. Ct. 829.

This has heretofore been the doctrine of the Circuit Court of Appeals for the Eighth Circuit.

A street improvement district in Little Rock issued bonds and levied a tax to pay them. Default having been made, a bondholder filed a suit in the federal equity court

for the appointment of a receiver to collect the tax. The district filed an answer in which it admitted all the allegations of the complaint and consented to the appointment of a receiver. A receiver was appointed, and a taxpayer appealed.

A motion was filed in the Court of Appeals to dismiss the appeal because the decree had been rendered by consent, and was therefore not appealable. The court held, however, that the record showed that the district court, as a court of equity, was without jurisdiction of the subject matter of the suit. It reversed the decree and remanded the cause with directions to dismiss the bill.

Street Grading District v. *Hagadorn*, 8 C. C. A., 186 Fed. 451.

Certiorari denied:

Hagadorn v. *Street Grading District*, 223 U. S. 721.

Subdivision (h) of Rule XII of the Federal Rules of Civil Procedure provides:

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except * * * (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Mr. Edmunds, in his treatise on the rules, says:

"Lack of jurisdiction of the subject matter constitutes ground for dismissal of the case at any time, at the suggestion of the parties or otherwise."

1 Edmunds' Federal Rules of Civil Procedure, page 604.

See also:

Cutler v. *Roe,* 7 How. 729;

Morris v. *Gilman,* 129 U. S. 315.

V

The district court, as a court of equity, was without power to appoint receivers to collect the drainage taxes in this case.

It has uniformly been held by this court that a federal court of equity is without power to appoint a receiver to levy or collect taxes. The want of power rests on two grounds: first, the levy and collection of taxes is a legislative and not a judicial function, and involves an exercise of the sovereign power of taxation which a court of equity cannot exercise, either through its own decree, or by substituting its officer for the officer designated by the law-making body; second, because there is always an adequate remedy at law by mandamus.

Heine v. *Levee Commissioners,* 19 Wall. 655;

Rees v. *Watertown,* 19 Wall. 107;

Meriwether v. *Garrett,* 102 U. S. 472;

Thompson v. *Allen County,* 115 U. S. 550;

Street Grading District v. *Hagadorn,* 8 C. C. A., 186 Fed. 451;

Johnson v. *Riverland Levee District,* 8 C. C. A., 117 Fed. (2nd) 711.

Notwithstanding the general principle that a court of equity is without power to appoint tax-collecting receivers, this court, in *Guardian Savings & Trust Company* v. *Road Improvement District*, 267 U. S. 1, decided in 1925, held that a receivership to collect road district taxes was proper in that case. But that was an unusual case, and the road district was atypical.

The road district involved in that case was not organized under a general statute, such as the general drainage law under which the drainage district in the present case was organized, but was created by special act of the legislature. The act appointed a board of commissioners, made a legislative assessment of benefits, provided for a tax to pay the bonds, and contained a provision that if any bond or interest coupon should not be paid within thirty days after maturity, "it shall be the duty of the Chancery Court of Poinsett County, on the application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the taxes aforesaid."

This court held that under the act creating the district the provision for the appointment of a receiver became one of the terms of the contract between the district and its bondholders, and that for this reason "the state law is not merely an enlargement of the remedial powers of a local court as in *Pusey & Jones Company* v. *Hanssen*, 261 U. S. 491." The court said:

> "The ground on which jurisdiction was denied by the Circuit Court of Appeals was that the power to levy and collect taxes was a legislative function of the state which could not be usurped by a federal court. But while that may be true as a general doctrine, it cannot apply where a state has authorized and confirmed an assessment and a mortgage of it as security

for bonds that the public is invited to buy, and has provided in terms for a collection by a receiver appointed in equity if there should be a default."

Guardian Savings & Trust Company v. *Road Improvement District,* 267 U. S. 1, 45 Sup. Ct. 201.

The federal district courts in Arkansas misinterpreted this decision as holding that they had jurisdiction to appoint tax-collecting receivers under a general statute of the state which authorized such appointments (Pope's Digest, section 4,484). Hundreds of federal receiverships of improvement districts followed.

In the course of a few years there was universal complaint about the operation of such receiverships on account of the allowance of what was regarded as exorbitant fees to receivers and their counsel. The complaints were so outspoken and vigorous that the legislature, in 1933, undertook to provide a remedy that would put an end to all tax-collecting receiverships in the state.

On the hypothesis that the power to appoint receivers to collect taxes could only come from the legislature, Act 46 of 1933 provided that no court should appoint receivers to collect levee, drainage or road district taxes. The legislature prefaced the act with a recital of the evils that made its passage imperative. The preamble of the act was as follows:

"Whereas, abuses are prevalent in receiverships of levee, drainage and road districts, in the allowance of excessive fees to counsel for filing suits for receivers, the allowance of excessive fees to receivers, the appointment of unnecessary attorneys for receivers and the allowance of excessive fees to them, all of which imposes an additional financial burden on the landowners of the district, and

"Whereas, the collection officers provided by law can collect improvement district taxes more expeditiously and at less expense than receivers, if they are made to discharge their duties;" * * *

The body of the act was as follows:

"Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes."

Acts of Arkansas of 1933, page 126.

A few days after the passage of the act a suit was filed in the federal court for the appointment of a receiver for a drainage district which had been organized under a general state statute. The district court held that Act 46 was unconstitutional and void, and it appointed a receiver to collect the drainage taxes. The district appealed. The Court of Appeals held that the act was valid, for while it repealed the general statute authorizing tax-collecting receiverships it provided other and equally efficacious remedies. It reversed the order appointing a receiver, and remanded the case with directions to dismiss the suit.

Drainage District v. *Mercantile-Commerce Bank & Trust Company*, 8 C. C. A., 69 Fed. (2nd) 138.

Certiorari denied:

Mercantile-Commerce Bank & Trust Company v. *Drainage District*, 293 U. S. 566, 55 Sup. Ct. 77.

The above case was decided in February, 1934. It settled the law that the federal courts were without power to appoint receivers to collect improvement district taxes in Arkansas. That is, it settled the law until receivers were appointed in the present case on December 22, 1936.

In the order appointing receivers in this case the district court wrote the word "*deemed*" before the word "receivers." The order reads: "The said commissioners of said district are deemed receivers of this court."

Under the *deemed receivership* theory, which effectually abrogated Act 46 of 1933, the district court from time to time made interlocutory orders, among others, as follows:

(1) Allowing and ordering paid various claims against the district; (2) extending the time for the payment of drainage taxes without interest or penalties; (3) authorizing the satisfaction of all accumulated delinquent taxes in the district by the payment of $1.00 per acre; (4) authorizing counsel for the State Bank & Trust Company to file and prosecute a petition for a writ of certiorari from the Supreme Court of the United States to the Supreme Court of Arkansas at the expense of the district in a case to which the Bank was not a party; (5) authorizing counsel for the Bank to take charge of and control the suit brought in the Lincoln chancery court for the collection of delinquent drainage taxes; (6) authorizing counsel for the Bank to file an amendment to the complaint in that case, to which the Bank was not a party, and prescribing the

issues to be raised in such amendment; (7) appointing an attorney for the district and fixing the compensation for his services; (8) cancelling the assessment of benefits on 1,080 acres of lands in the district on the ground that the lands were not benefited; (9) fixing the amount of the compensation of a former attorney for the district; (10) making allowances to the receivers as partial compensation for their services; and (11), distributing tax collections between the Bank and an intervener. (Rec. 13-21.)

If the district court derived the power to make the foregoing orders from Act 46 of 1933, then its power in a *deemed* receivership under the act was far greater than its power under an ordinary receivership, and was certainly greater than the power of the state chancery courts. An analysis of a few of the orders will show this.

By the order of January 28, 1938, the court extended the time for paying drainage taxes without interest, penalty or costs.

Assuming that the court had the power to grant a mandatory injunction directing the collection of taxes in the time and in the manner prescribed by state statutes, it was still without power to make this order. There is no statute authorizing the commissioners to extend the time for the payment of taxes. No court in Arkansas is invested with such a power. An extension can only be authorized by an act of the legislature.

The order of March 24, 1938, recited that a majority of the lands in the district had been forfeited to the district for the nonpayment of taxes, and it authorized the former owners of the lands to purchase them from the district at a dollar an acre.

On the forfeiture of these lands to the district, the district became the owner of them. The district held them in trust for all the landowners in the district, and it was its duty to sell them for the best prices obtainable to raise funds to pay the debts of the district. Sales at fair prices would have redounded to the benefit of all the other landowners.

Under the law, the bondholders had no interest in these lands, and the district court was without power to authorize a sale of them at a price fixed by the court at the instance of a bondholder.

> "When the lands are bought in by the commissioners at the foreclosure sales, they become the property of the district, to be used for the purpose of raising revenues to pay the bonds. The lands do not belong to the bondholders. * * * The lands thus purchased become the absolute property of the district, and express authority is conferred by the statute to sell the lands at prices fixed by the commissioners."
>
> *Arkansas-Louisiana Highway Improvement District* v. *Pickens,* 169 Ark. 603, 276 S. W. 355.

The order of the district court upset the whole statutory scheme for the adjustment of the proportionate liabilities of the landowners. Many of the lands forfeited to the district had been delinquent since 1932. The delinquent taxes in many instances totaled more than ten dollars an acre. Yet the order of the district court permitted their purchase at a dollar an acre. This necessarily resulted in an injustice to all the landowners in the district who had habitually paid their taxes as they became due.

> "The theory is, and the practice should be, in order to comply with the spirit of the scheme, for the

commissioners in selling the lands to secure a sufficient price at least to cover the expenses and all of the delinquent assessments up to the time of the resale, so that the lands will bear their full share of the burden of the expense of the improvement."

Arkansas-Louisiana Highway Improvement District v. *Pickens, supra.*

The order of June 30, 1938, canceled an assessment of benefits on 1,080 acres of land, on the ground that the district court found that the lands were not benefited.

The commissioners had no power to cancel an assessment of benefits. No state court had any such power. The statute applicable to this drainage district provides:

"Any owner of real property within the district who conceives himself to be aggrieved by the assessment of benefits, or deems that the assessment of any other lands in the district is inadequate, shall present his complaint to the county court at the first regular, adjourned, or special session, held more than ten days after the publication of said notice; and said court shall consider the same and enter its finding thereon, either confirming such assessment or increasing or diminishing the same; and its findings shall have the force and effect of a judgment from which an appeal may be taken within twenty days, either by the property owners or by the commissioners of the district."

Act. 279 of 1909, section 7.

The statutory method for relief against an assessment of benefits is exclusive, and the remedy which it provides must be pursued within the time and in the court prescribed by the statute.

It will be seen that many of the orders referred to were beyond the power of an equity court in an ordinary receivership. Yet the district was helpless with reference to them, as they were not final judgments, and no appeal could be taken from them.

The effect of the decision of the Court of Appeals is to hold that the district court had the power under Act 46 to make the orders set forth above. If so, the effort of the legislature to prohibit tax-collecting receiverships not only failed of its purpose but actually resulted in broadening the powers of federal equity courts in such receiverships. In this respect the decision nullifies the whole legislative policy to put an end to the flagrant evils which the law-making body found had grown up in improvement district receiverships. The state itself is therefore vitally concerned with the outcome of this case.

The Court of Appeals said that the appointment of receivers in this case was justified by the decision of the Supreme Court of Arkansas in *Dickinson* v. *Mingea,* 191 Ark. 946, 88 S. W. (2nd) 807. The court wholly misconceived the purport of that decision.

That was an appeal from an order appointing receivers to collect the taxes in an improvement district. The Supreme Court reversed the appointment and remanded the cause with directions to dismiss the suit. It held that Act 79 of 1933, which was identical with Act No. 46 except that it applied to city improvement districts, deprived the state chancery court of the power to appoint receivers for improvement districts.

It was contended in that case that Act 79 violated the fourteenth amendment to the federal constitution. In hold-

ing that the legislature had the power to abolish a remedy provided it substituted one that was equally efficacious the court used the following language:

> "The commissioners become receivers in effect in that they become subject to the jurisdiction of the court. The commissioners would thereafter report to and be supervised by the court just as a receiver would be to the end that they were made to discharge the duties imposed on them by law."

This language must be construed in connection with the proposition to which the court applied it. It is inconceivable that the court meant to hold, by the language employed by it in pointing out the efficacy of the mandatory injunction, that Act 79 authorized the appointment of receivers for city improvement districts, when the court expressly held that the act prohibited the appointment of such receivers.

In a later case the court said:

> "The chancery court is not deprived of its jurisdiction, but the chancery court did not have power to appoint a receiver, the appointment being prohibited by Act 79 of 1933. But the chancery court not only appointed a receiver contrary to the provisions of said act, but it allowed to Claude Williams, Attorney, $100; to W. N. Ivie the sum of $100; to Henry Davis the sum of $100; and to Duty and Duty $100. These were all attorneys' fees in connection with the receivership. It also allowed the receiver $100. The appointment of the receiver being erroneous and in violation of Act No. 79, it follows that the attorneys' fees and the receiver's fee were improperly allowed."

Rogers Paving Improvement District v. *Swofford*, 193 Ark. 260, 99 S. W. (2nd) 577.

It was contended by counsel for the respondent that the *Dickinson* and *Rogers Paving* cases are distinguishable from the present case because in those cases an outsider was appointed receiver, whereas in the present case the commissioners were appointed receivers.

Act No. 46 of 1933 prohibits the appointment of receivers for drainage districts. It contains no exception that receivers may be appointed if the commissioners are named as the receivers. The Circuit Court of Appeals itself failed to find such a distinction in the act. In a recent case it said:

> "The commissioners had also allowed themselves to be appointed formal receivers of the District in a creditors' suit in equity, although Acts of Arkansas 1933, No. 46, sec. 1, provided that all laws providing for or authorizing the appointment of a receiver for any such district (levee, drainage or road) are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes."
>
> *Spellings* v. *Dewey*, 8 C. C. A., 122 Fed. (2nd) 652.

The court cited the *Dickinson, Rogers Paving* and *Mercantile-Commerce Bank* cases as authority.

The Supreme Court of Arkansas has never held that Act 46 conferred power on the state chancery courts to appoint commissioners as receivers of improvement districts.

VI

A state statute cannot enlarge the equity jurisdiction of the federal courts, or obliterate the distinction between law and equity in such courts.

A vital point in this case is that the district court, as a court of equity, was without jurisdiction of the subject matter of this suit—the levying, extension, collection and distribution of taxes—and that it was therefore not only without jurisdiction to levy a tax of 6½% on benefits in the drainage district, but it was without jurisdiction to issue a mandatory injunction compelling the extension and collection of such tax, or of any drainage taxes, and requiring all tax collections to be paid into the registry of the court for distribution by the court.

The Court of Appeals held that Act 46 of 1933 conferred power on the district court to issue the mandatory injunction involved in this case. This is contrary to the applicable decisions of this court, which are cited under topic V above.

The effect of the decision is to obliterate the distinction between law and equity in the federal courts sitting in Arkansas, and to enlarge the equity jurisdiction of such courts.

Act 46 provides two remedies in lieu of receiverships—a mandamus at law and a mandatory injunction in equity.

A federal law court has inherent power to issue a mandamus to compel the collection of taxes, so Act 46 does not affect the jurisdiction of the federal law courts. But a federal equity court is without jurisdiction of the sub-

ject matter of the collection of taxes, and Act 46 could not enlarge the equity jurisdiction of the federal courts by empowering them to issue mandatory injunctions to compel the collection of taxes in improvement districts in Arkansas.

A mandamus at law is just as efficacious to enforce the collection of taxes as a mandatory injunction in equity, for neither mandamus nor mandatory injunction can do more than require the taxing officers to discharge their statutory duties.

The levying and collection of taxes is not a subject matter over which federal courts of equity have jurisdiction, but is a subject matter over which the legislature can confer jurisdiction on the state equity courts. The effect of Act 46, therefore, was to enlarge the jurisdiction of state equity courts by empowering them to issue mandatory injunctions to enforce the collection of taxes, but it could not enlarge the jurisdiction of federal equity courts so as to empower them to issue mandatory injunctions for such purpose.

In the federal courts, the existence of an adequate remedy at law deprives a federal court of equity of jurisdiction.

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."
>
> Judicial Code, section 267.

The present petition, however, goes far beyond the question of the existence of an adequate remedy at law as militating against the jurisdiction of the district court as

a court of equity. It is directed to the total want of jurisdiction of the district court as a court of equity over the subject matter of the levying, extension, collection and distribution of taxes. It challenges on this ground the decision of the Court of Appeals that Act 46 enlarged the jurisdiction of federal equity courts sitting in Arkansas so as to include the power to enforce the levy and collection of taxes by mandatory injunction.

If the decision of the Court of Appeals is sound on principle, state legislation could confer unlimited jurisdiction on federal equity courts in taxation matters. But this court has uniformly held that this cannot be done, and the decision of the Court of Appeals is directly in the face of the applicable decisions of this court on the subject.

> "That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by state statute is likewise clear. * * * The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court."

Pusey & Jones v. *Hanssen,* 261 U. S. 491, 43 Sup. Ct. 454.

See also:

Whitehead v. *Shaddock,* 138 U. S. 146;

Kelleam v. *Maryland Casualty Company,* 321 U. S. 377, 61 Sup. Ct. 595.

> "The statute confers jurisdiction on the courts of Texas; it does not extend the jurisdiction of the District Courts of the United States. The latter courts are given power to receive jurisdiction only by the Federal Constitution; this jurisdiction is conferred solely by the Congress of the United States. A state

statute may create rights that the federal courts will enforce or protect; it cannot enlarge or restrict the equitable jurisdiction of the federal courts."

Sun Oil Company v. *Burford*, 5 C. C. A., 130 Fed. (2nd) 10.

"The line of demarkation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation."

Hollins v. *Brierfield Coal & Iron Company*, 150 U. S. 371.

Prior to its decision in the present case, the Court of Appeals had held that a federal equity court was without jurisdiction to grant a mandatory injunction to enforce the collection of taxes in a levee district.

The levee district law in Missouri is almost identical with the drainage district law in Arkansas. A general statute of the state provides that the discharge of the duty of boards of supervisors in levee districts to collect taxes may be enforced by mandamus.

A complaint was filed in a bondholders' suit in a federal equity court praying that "a mandatory injunction issue commanding the board of supervisors of the levee district to enforce and collect the taxes and distribute the proceeds to the bondholders." In holding that the district court, as a court of equity, was without jurisdiction of the cause the Court of Appeals said:

"That the federal court has no power to collect taxes has been so frequently decided that it is no longer debatable. The remedy provided by statute for

the payment of bonds issued under authority of a law of a state is exclusive."

Johnson v. *Riverland Levee District,* 8. C. C. A., 117 Fed. (2nd) 711.

It is true that the Missouri law only provided for a mandamus, and not a mandatory injunction. But federal equity courts are without jurisdiction to collect taxes, and no state statute can confer such jurisdiction on them.

The only case cited by the Court of Appeals as authority for its holding that Act 46 empowered the district court to issue the mandatory injunction in this case was *Guardian Savings Co.* v. *Road District,* 267 U. S. 1. But that was not a mandatory injunction suit, and the case is not in point.

The *Guardian Savings Co.* case merely held that a provision for the appointment of a receiver in a special act creating a road improvement district constituted one of the terms of the contract between the district and its bondholders, and thus created a substantive right which a federal equity court could enforce, as contradistinguished from a state statute enlarging the remedial powers of equity courts, which a federal equity court could not enforce.

In their brief below, counsel for the respondent, after quoting from the opinion of this court in *Thompson* v. *Allen County,* 115 U. S. 550, said:

"But for Act 46 of 1933, the law as announced above would be applicable."

Counsel then contended, and the effect of the decision of the Court of Appeals was to hold, that a state statute

may confer the legislative power of taxation on federal equity courts.

Assuming for the sake of the argument that a state statute could confer the legislative power of taxation on a federal equity court, the statute would measure the extent of the power conferred. Act 46 did not confer on the district court the power of taxation which it exercised in this case. The act provides:

> "Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the man- and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by mandamus or by a mandatory injunction in equity."

Assuming that Act 46 empowered the district court to issue a mandatory injunction to enforce the collection of drainage taxes, all that the district court could do was to order the taxing officers to perform their statutory duties. It could not by a mandatory injunctional order require them to do things which were not only not authorized by state statutes but were contrary to the requirements of such statutes.

Act 46 did not empower the district court to appoint receivers to collect the drainage taxes in this district. The act provides: "No court shall appoint a receiver to collect levee, drainage or road district taxes."

Act 46 did not empower the district court to require all tax collections to be paid into the registry of the court.

Act 279 of 1909, under which the district was organized, provides:

"The amount of the taxes herein provided for shall be * * * collected by the collector of the county along with the other taxes * * * and the same shall by the collector be paid over to the county treasurer at the same time that he pays over the county funds."

Act 46 did not empower the district court to enjoin the commissioners from paying out any of the funds of the district except on the order of the court.

Act 279 of 1909 provides:

"The treasurer shall pay out no money save upon the order of the board, and upon a warrant signed by the chairman thereof."

Act 46 did not empower the district court to sequester the proceeds of all district taxes for the exclusive benefit of the respondent.

Act 279 provides:

"Every warrant shall state upon its face to whom, the amount and the purpose for which it is issued. All warrants shall be dated and shall be numbered consecutively in a record to be kept by the board of the number and amount of each; and no warrant shall be paid unless there are in the treasury funds enough to pay all outstanding wararnts bearing a lower number."

The organizational statute thus authorizes the board of commissioners to issue warrants for the ordinary expenses of the operation of the district, and it prescribes the order in which such warrants shall be paid. Act 46 did not empower the district court to require all the revenues of the district to be paid into the registry of the court, thereby leaving the board of commissioners without funds to meet current expenses.

Act 46 did not empower the district court to require the commissioners to pay into the registry of the court, for exclusive application on the respondent's judgment, the proceeds of tax foreclosure suits.

Act 279 of 1909 provides that when delinquency taxes are collected by foreclosure proceedings in chancery, "the proceeds of such taxes and collections shall be applied, after payment of costs, first to overdue interest and then to payment pro rata of all bonds issued by said board which are then due and payable."

The decree of the district court left bondholders other than the respondent without the means of collecting their bonds until the respondent was paid in full.

Act 46 did not empower the district court to distribute the proceeds of all taxes collected in the district.

The whole function of taxation, and every step in the process of taxation, is legislative, and the power to distribute the proceeds of taxes, as well as the power to levy, extend and collect taxes, must emanate from the legislature.

> "The scope of the principle is that each step in the process of taxation from the beginning to the end can be taken only as the legislature may provide. This is true of the levy of the tax, of the assessment of the property subject thereto, if it be an ad valorem tax, of the collection of the tax, *and of its disbursement after it has been collected.*" (Italics supplied.)
>
> *Preston* v. *Sturgis Milling Company,* 6. C. C. A. 183 Fed. 1.
>
> Certiorari denied:
>
> *Preston* v. *Sturgis Milling Company,* 220 U. S. 610.

Act 46 did not empower the district court to make any of the orders referred to on page.....of this brief.

Assuming that a state statute can confer the legislative power of taxation on federal equity courts, Act 46 does not purport to confer the whole taxing power, beginning with the levy of the tax and including the disbursement of the proceeds, on any court. By the express terms of the act the power conferred is limited to an order requiring that drainage taxes "*be collected at the time and in the manner and by the officers specified in the statutes creating them.*"

Act 46 of 1933.

Conclusion.

The questions involved in this case are of great importance in the State of Arkansas. The federal courts in that state interpreted the decision of this court in the *Guardian Savings Company* case, *supra,* as opening wide the doors of federal equity courts for tax-collecting receiverships. There was a scramble to put improvement districts of all kinds into receiverships, whether there was a practical necessity for such receiverships or not, because the courts treated them as in the nature of creditors' suits, and allowed large fees for filing the suits. Such exorbitant fees were allowed to receivers and to their counsel that it became a matter of public scandal. Yet, there was neither occasion nor excuse for such fees, for under state laws improvement district taxes are collected along with the state and county taxes by the state taxing collectors, who pay the proceeds of improvement district taxes to the receivers, if there is a receivership, who in turn pay them to the bondholders. Receivers do not even

bring the suits to foreclose delinquent taxes. Such suits must be brought by the commissioners of the districts, and they are filed and prosecuted by the regular attorneys for the district. When delinquent taxes are collected, they are turned over to the receivers. There is, therefore, practically nothing for receivers or their counsel to do in the collection of improvement district taxes except to receive the proceeds of the taxes from the collecting officers and turn them over to the bondholders.

Under the state system for collecting improvement district taxes, a court receiver is a fifth wheel on the wagon. This fact, together with the evils which had grown up in receivership cases, was the basis of Act 46 of 1933. The act was a splendid piece of constructive legislation in the interest of public economy, yet the effort of the legislature to conserve public economy by prohibiting improvement district receiverships is being circumvented, if not completely nullified, by the invention of *deemed* receiverships, and by expanding the mandatory injunctional process to cover the whole field of an ordinary receivership. The result is that the equity jurisdiction of the federal courts is in a state of chaotic confusion, for which the law provides no remedy unless the federal equity courts are confined to their historic jurisdiction.

The present case is a fitting example of the confusion. Under the combination of a deemed receivership and a mandatory injunction, a federal equity court has taken over the entire affairs of an improvement district for the purpose of levying, extending and collecting taxes to pay a judgment creditor, and its actions in that respect have received the imprimatur of the Circuit Court of Appeals.

The state laws provide that the commissioners of improvement district shall employ attorneys to advise them in the conduct of the district's affairs. These attorneys are required by law to bring the necessary suits for the collection of delinquent taxes. The Kersh Lake Drainage District employed a regular attorney, and he filed a suit in the state chancery court to collect all delinquent taxes.

The order of the district court in this case of July 10, 1940, made on the petition of the State Bank & Trust Company, provides:

> "It is further ordered that the said foreclosure proceedings shall be conducted by A. H. Rowell and A. F. House as attorneys for the creditors of the district." (Rec. 45.)

The conduct of the suit was taken over by the attorneys for the judgment creditor. Certain landowners pleaded a decree of the state chancery court in *W. A. Fish et al.* v. *Kersh Lake Drainage District* which held that the plaintiffs had paid all the taxes which were legally collectible on their lands, and perpetually enjoined the district from collecting additional taxes, as res judicata of their non-liability for further taxes. The Supreme Court of Arkansas held that the *Fish* decree was res judicata.

Thereupon, on October 9, 1939, the district court made the following order:

> "It is considered, ordered and adjudged that Honorable George B. Rose be appointed the attorney for the commissioners, acting as receivers of this court, with directions to file a petition for certiorari in the Supreme Court of the United States to review said judgment of the Supreme Court of Arkansas, and to prosecute said petition to a conclusion.

"It is further ordered that the commissioners of the district advance the necessary expenses to prosecute said certiorari proceedings, the same to be paid out of funds now or hereafter in their hands as commissioners."

The State Bank & Trust Company was not a party to the suit, and it could not file a petition for certiorari. The district court, therefore, allowed the Bank to prosecute the petition in the name of the district, and at the expense of the district.

It may be stated in passing that this court granted certiorari, and affirmed the judgment of the Supreme Court of Arkansas.

Kersh Lake Drainage District v. *Johnson,* 309 U. S. 485.

A federal equity court sitting in Arkansas enjoined the election of new commissioners in a drainage district, declared the old commissioners to be the duly qualified commissioners of the district and made them receivers of the court, and entered an order that "*the court reserves jurisdiction to fill any vacancies thereafter occurring among said commissioners and receivers till further order.*" (Italics supplied.)

Spellings v. *Dewey,* 8 C. C. A., 122 Fed. (2nd) 652.

The Court of Appeals reversed and dismissed, and the case is cited merely to illustrate the utter confusion which exists with reference to federal equity jurisdiction over improvement districts in Arkansas.

The result of this case will vitally affect all improvement districts in Arkansas. It will determine whether the legislative policy of the state to abolish tax-collecting re-

ceiverships for improvement districts can be thwarted by the judicial novelty of *deemed* receiverships; whether the federal courts in that state, as courts of equity, have jurisdiction of the subject matter of the levying, extension, collection and distribution of improvement district taxes; and whether a state statute can enlarge the jurisdiction of federal equity courts so as to empower them, by mandatory injunctional orders, to take over the conduct of improvement district affairs, including the levy, extension, collection and distribution of improvement district taxes.

The decree of the Circuit Court of Appeals should be reversed, and the cause remanded with instructions to direct the dismissal of the case for want of jurisdiction in the district court of the subject matter of the suit.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 537

KERSH LAKE DRAINAGE DISTRICT ..... *Petitioner*

v.

STATE BANK & TRUST COMPANY
OF WELLSTON, MISSOURI ..... *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

In their Summary Statement counsel give the history of this litigation down to the rendition of the decree by the District Court in December, 1936, granting equitable relief as provided for in Act 46 of 1933, and the affirmance of that decree in 1937 by the Circuit Court of Appeals. See *Kersh Lake Drainage District* v. *State Bank & Trust Company*, 92 F. (2d) 783. Their narrative skips an interval of

six years and then takes up with the filing of the Motion to Wind Up Receivership (R. 11). During that interval much happened which throws light on the merits of the Petition for Certiorari.

After affirmance by the Circuit Court of Appeals the Commissioners in the name of the District filed a foreclosure suit. It is still pending. Their property was delinquent, and they and other landowners were made defendants. Thus we have the odd situation of the three commissioners, Holthoff, Warren and Free, suing themselves as delinquent landowners. They own more lands than any other persons in the District, and the amounts at stake for them are substantial (R. 28). In the foreclosure suit the Commissioners, as defendants, and other landowners pleaded in bar of the District's right to collect taxes a decree rendered by the Lincoln Chancery Court in 1932, hereinafter referred to as the "Fish decree". It exempted two-thirds of the lands of the District from further taxation. It was a prearranged decree. The Commissioners who were supposed to defend the suit were the principal beneficiaries of the decree. The trial court overruled the plea of *res adjudicata* and entered a decree of foreclosure. The landowners appealed. By a four to three decision of the Supreme Court of Arkansas they obtained a reversal. See *Johnson* v. *Kersh Lake Drainage District*, 198 Ark. 743, 131 S. W. (2d) 620. At that point the attorneys for the creditors thought it advisable to have the district apply to this Court for a writ of certiorari. The Commissioners, with a favorable decision from the Supreme Court of Arkansas, were opposed to any further judicial proceedings which might disturb their advantage. They refused to allow the District to apply to this Court for the writ. The creditors put the matter before the District

Court. The Commissioners, with District funds, employed a special attorney to resist the application (R. 29). The District Court directed the Commissioners to proceed and appointed G. B. Rose to present the petition (R. 29). The writ was issued, but on the merits this Court affirmed. See *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485.

The Supreme Court of Arkansas, in its opinion, pointed out that the only way in which the Fish decree could be eliminated as a defense in the foreclosure suit was by direct attack for fraud under a special statutory proceeding. The creditors asked the Commissioners to make such an attack and to file supplemental pleadings in the foreclosure suit. Still intent on preserving for themselves the fruits of the Fish decree, the Commissioners declined. Again the creditors went to the District Court. It directed the Commissioners to file the supplemental pleadings, but declined to require them to attack the Fish decree for fraud. In the Order, however, the right of the creditors to make an independent attack was recognized (R. 45).

The foreclosure suit came on for trial the second time and the supplemental pleadings filed by the District were dismissed. In the meantime the creditors had filed the suit attacking the Fish decree for fraud, and the complaint in that suit was also dismissed. Appeals were perfected in both suits. In the Supreme Court of Arkansas the cases were argued together. That Court found that there was fraud in the rendition of the Fish decree and reversed the decree of the trial court. Having thus vacated the decree which had supplied the basis for the plea of *res adjudicata*, it reversed the decree in the foreclosure suit and ordered all the lands including those of the Commissioners to be charged with taxes. See *Kersh Lake*

Drainage District v. *Johnson*, 203 Ark. 315, 157 S. W. (2d) 39. The Commissioners, as defendant landowners, without any urging, then applied to this Court for a writ of certiorari claiming that the Supreme Court of Arkansas had deprived them of constitutional rights by reversing the decree in the foreclosure suit. The application was denied. See *Johnson* v. *Kersh Lake Drainage District*, 316 U. S. 673.

After the remand of both suits to the trial court supplemental pleadings were filed. In those filed in behalf of the delinquent landowners there is a suggestion that the attorneys who had been appointed by the District Court to participate with the regularly employed attorney of the District in the foreclosure suit were going beyond the authority conferred upon them. No effort was made to go to the Federal Court and ask that the authority of the attorneys be clarified. The two cases were submitted to the chancellor on briefs in October of 1942. A little later, but six years after the entry of the decree in this suit, the attorneys who represented the Commissioners and others as defendants in the foreclosure suit conceived the idea that it would be advantageous to them to dispense with supervision by the District Court. By doing that they could eliminate the two attorneys appointed by the District Court to associate with the District's regularly employed attorney and thereby dictate the course which should be followed by the District in its suit against them as defendants. They had visions of another Fish decree. These attorneys for the landowners then asked three of their clients, the Commissioners, to adopt a resolution in behalf of the District authorizing them to file the Motion to Wind Up Receivership. The Commissioners did not even consult the regularly appointed attorney for the District. (Stipulation, Paragraph XX, R. 34.)

These Commissioners evidently did not think the supervision being accorded by the District Court was that of an ordinary receivership for without applying for permission, or making known their plans, they authorized their individual attorneys to make a strategic move in the name of the District, and they incurred expenses which were charged to the District in filing the motion and in appealing to the Circuit Court of Appeals, when the only object was to obtain for themselves a personal benefit.

The order of the District Court which is most irritating is that of July 10, 1940. Counsel quote only that portion of the order which serves their argument. To them a comma is a period. At page 41 of their brief they say:

> "The order of the district court in this case of July 10, 1940, made on the petition of the State Bank & Trust Company, provides:
>
> " 'It is further ordered that the said foreclosure proceedings shall be conducted by A. H. Rowell and A. F. House as attorneys for the creditors of the district' (R. 45).
>
> "The conduct of the suit was taken over by the attorneys for the judgment creditors."

The order reads as follows:

> "It is further ordered that the said foreclosure proceedings shall be conducted by A. H. Rowell and A. F. House as attorneys for the creditors of the district, and in conjunction with Robert A. Zebold as attorney for Kersh Lake Drainage District" (R. 30, 45).

ARGUMENT

The District Court Did Not Undertake to Levy a Tax

Opposing counsel have improperly intruded the question as to the power of the District Court to levy a tax. There is no prayer in the Complaint that a tax be levied (R. 2). In the Decree there is an express finding that the Jefferson Circuit Court, the court in which the District was created, had already levied a tax (R. 9). A copy of the Order of the Jefferson Circuit Court levying the tax is made an exhibit to the Response (R. 26). The District Court has made a finding that it has never been called upon to levy a tax. (Finding of Fact "P", R. 45.) Any question concerning the power of a federal court of equity to levy a tax is definitely out of this case.

Res Adjudicata

The Decree of the District Court was entered December 22, 1936 (R. 11). There is no question concerning the court's general jurisdiction. The suit was between citizens of different states, and the amount in controversy was in excess of $3,000.00, exclusive of interest and costs. The suit was docketed on the equity side and the court proceeded to a decree granting the relief as prayed for in the Complaint. Neither in the District Court nor in the appellant court was any jurisdictional question raised. A void judgment, of course, cannot be a basis for *res adjudicata*, but a judgment finding that the court has jurisdiction is not a void judgment. Here, inherent in the granting of relief was the finding that a court of equity had jurisdiction. A judgment on that point is conclusive: See:

Des Moines Navigation & Railroad Co. v. *Iowa Homestead Company,* 123 U. S. 552;

Chicot County Drainage District v. *Baxter State Bank,* 308 U. S. 371.

A motion to terminate a supervisory proceeding for cause is something quite different from a motion to dismiss for lack of jurisdiction. To terminate for cause is a continuing power. The question of jurisdiction is settled by the original Decree. See:

Western Union Telegraph Co. v. *International Brotherhood of Electrical Workers,* (C.C.A. 7) 133 F. (2d) 955.

To ask for relinquishment of supervision for cause is permissible, but to ask that after the lapse of seven years that a proceeding be dismissed because the original decree was not within the court's jurisdiction constitutes a collateral attack on that decree.

It is elementary law that a judgment or decree is *res adjudicata* not only as to all defenses presented, but also as to all which might have been presented. See:

Commercial Electric Supply Co. v. *Curtis,* (C.C.A. 8) 288 F. 657.

Church v. *Gallic,* 76 Ark. 423, 88 S. W. 979.

Is Was Proper to Proceed in Equity

The Act provides that the Commissioners may, by "mandatory injunction in equity" be complelled to perform their duties. The Supreme Court of Arkansas has twice construed Act 79 of 1933 which is identical to Act

46 except that it applies to municipal improvement districts. See *Dickinson* v. *Mingea*, 191 Ark. 946, 94 S. W. (2d) 803, and *Rogers Paving Improvement District No. 3* v. *Swofford*, 193 Ark. 260, 99 S. W. (2d) 577. The prayer of the Complaint was for supervision in accordance with the interpretation announced in the Mingea case (R. 3). In that case the Arkansas court had said:

> "The chancery courts have not been deprived of their jurisdiction in regard to improvement districts, and neither act 46 nor act 79 manifests any such intention. The provisions of these acts, even to their preamble, are identical except as to the designation of the kinds of improvement districts to which they respectfully relate" (p. 951).
>
> * * * * * *
>
> "The verb 'made' as here employed means to require or compel. But how are the commissioners to be 'made' to discharge their duties? Section 1, above quoted, answers 'by mandamus or by a mandatory injunction in equity.' There is therefore no abridgement of the court's jurisdiction. The commissioners become receivers in effect in that they become subject to the jurisdiction of the court. The commissioners would thereafter report to and be supervised by the court just as a receiver would be to the end that they were 'made' to discharge the duties imposed upon them by law. The receivers could do no more than to follow and be governed by the law" (p. 952).

Prior to the rendition of the decision in the case of *Street Grading District* v. *Hagadorn*, (C.C.A. 8) 186 F. 451, there was no Arkansas statute providing for the appointment of a receiver for a municipal improvement district in the event of default in the payment of bonds. That decision was rendered in 1911. Subsequently the statute was enacted which provided for the appointment of re-

ceivers for municipal improvement districts in the event of default. The jurisdiction of equity with respect to such receiverships was the jurisdiction to which the court referred in the above language quoted from the opinion in the *Mingea* case. The 1933 acts put an end to fee paying receiverships in all types of improvement districts. To avoid invalidation under the Federal Constitution, it was necessary that adequate substitute remedies be provided. The equitable remedy provided by Act 46 of 1933 was the substitute for the equitable remedy theretofore existing.

This Court has held that a Federal court of equity may dispense the receivership remedy which is provided by State statute. See *Guardian Savings & Trust Co.* v. *Road Improvement District No. 7*, 267 U. S. 1. The remedy provided by Act 46 of 1933, according to the interpretation given by the Supreme Court of Arkansas, is substantially the same remedy which in the above case was held to be within the competence of a federal court of equity.

In an effort to distinguish, opposing counsel say that the district which issued the bonds involved in *Guardian Savings & Trust Co.* v. *Road Improvement District, supra,* was "atypical". That statement is erroneous. The Arkansas statute which was before this Court in that case was the autotype of all Arkansas statutes general and special, providing for the creation of improvement districts and the issuance of bonds.

The statute under which municipal improvement districts are formed contained such a provision. See *Dickinson* v. *Mingea, supra,* for a reference to Act 64 of 1929. The general statute providing for the creation of road improvement districts in Arkansas, (now repealed) enacted

in 1915, contained such a provision. See Kirby & Castle's Digest of the Statutes of Arkansas, Section 9152. The general act for the creation of drainage districts in Arkansas, enacted in 1909, the act under which Kersh Lake Drainage District was formed, contained such a provision. See Kirby & Castle's Digest of the Statutes of Arkansas, Section 5864. We know of no improvement district statute which authorizes the issuance of bonds which does not contain such a provision. No bonds could be issued in the absence of such a provision. Experience had taught investors that the remedy by mandamus was worthless, and that with no other remedy their bonds would be worthless. All of the foregoing statutory provisions for remedies by ordinary receiverships were repealed by the two Acts of 1933.

In speaking of the case of *Mercantile Commerce Bank & Trust Co.* v. *Drainage District*, 69 F. (2d) 138, counsel say:

> "The above case was decided in February, 1934. It settled the law that the federal courts were without power to appoint receivers to collect improvement district taxes in Arkansas. That is, it settled the law until receivers were appointed in the present case on December 22, 1936."

The receivership there sought was of the type provided for by Section 5864 of Kirby & Castle's Digest. It was denied because that statutory provision had been repealed by Act 46 of 1933. That case was decided prior to *Dickinson* v. *Mingea*, *supra*, which interprets the 1933 Acts as providing for a quasi receivership, with the substance of the remedy preserved, but with the fee paying attributes eliminated.

That Act 46 of 1933 provides also for a remedy by mandamus is unimportant. The very statute which was before this court in the case of *Guardian Savings & Trust Co.* v. *Road Improvement District No. 7, supra*, also contained such a provision. See Section 20, Act 322 of 1919. Supervision in equity is a virile remedy. Mandamus is a futile proceeding.

Waiver

If we assume that, technically speaking, the suit should have been docketed on the law side, that error has been waived. Counsel has cited *Lewis* v. *Cocks*, 23 Wall. 466. That was a proceeding in ejectment. It was obvious that a law case was being thrust into a court of equity. Under such circumstances a court of equity will dismiss *sua sponte*. On the other hand no equity court will dismiss *sua sponte* a suit which is not obviously of a legal nature. The District, acting through its Commissioners, cheerfully acquiesced in the supervision by the District Court for a period of six years. Then by decrees of the State court they were cornered and made to realize that the day was not far distant when they would have to pay the taxes which had legally been assessed against their lands. At that point they found supervision to be "inconvenient" (R. 34 par. XX) and allowed their individual attorneys to use the name of the District in seeking for them an individual advantage. A court of equity will not tolerate an about face for strategic purposes. See *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530. Only when it is obvious that the suit is completely out of place in a court of equity will there be entered *sua sponte* an order of dismissal. In all other a waiver will be exacted if there is delay in making objection. See *Pennsylvania* v. *Williams*, 294 U. S. 176; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S.

481; *Matthews* v. *Rogers*, 284 U. S. 521; *Atlas Insurance Co.* v. *Southern Inc.* (footnote), 306 U. S. 563, and *Audit Company of New York* v. *City of Louisville*, (C.C.A. 6) 185 F. 349:

In *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, it is pointed out that even in cases which seem to be preponderantly of a legal nature, equity courts had retained jurisdiction where there were "special facts" or on account of the kind of "relief sought" or because the defendant had "waived" the objection. We quote from the opinion:

> " * * There are cases in the federal courts in which suits in equity to quiet title brought by one out of possession against one in possession have been entertained, because of the special facts, or because of the particular relief sought, or because the defendant waived the objection of lack of equity jurisdiction. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417; *Schroeder* v. *Young*, 161 U. S. 151; *Duignan* v. *United States*, *ante*, p. 195; *Jones* v. *Prairie Oil & Gas Co.*, 173 U. S. 195; *Kilgore* v. *Norman*, 119 Fed. 1006 aff'd 120 Fed. 1020; *Big Six Co.* v. *Mitchell*, 138 Fed. 279; *Continental Trust Co.* v. *Tallassee, etc. Co.*, 222 Fed. 694, 702. Such waiver is possible, because the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court as a federal court, but to the merits" (p. 691).

The element of "obviousness" is missing here but the "special facts" are present. The statute under consideration was substituted for one which gave an equitable remedy. It specifically provides for the use of "a mandatory injunction in equity". The Arkansas court has interpreted the statute as providing the equivalent of an equitable receivership. The District Court has concluded

that a Federal court of equity may grant relief in accordance with Act 46 of 1933 (R. 46). The Circuit Court of Appeals has affirmed. Only with the turn of events which necessitated desperate measures did the Commissioners find technical grounds for objecting to the jurisdiction. When they were before the Supreme Court of Arkansas on the first appeal, they conceded that Federal Court supervision was proper. We quote from the opinion in the case of *Johnson* v. *Kersh Lake Drainage District*, 198 Ark. 743, 131 S. W. (2d) 620:

> "As we view it, the power of the Federal court to make the mandatory order which it made is unquestioned.
>
> "In the present case appellants are not resisting the order of the Federal court directing the District to assess and collect a tax. *They concede the validity of that order* and the duty of the District and its officers to obey it" (Emphasis supplied).

If the petitioners ever had any right to object it has clearly been waived.

Conclusion

Every order made in this proceeding, with the exception of those which required the Commissioners to apply for a writ of certiorari and to allow the attorneys for the creditors to associate with the District's regularly employed attorney in the foreclosure suit, was entered at the request of or with the consent of the District. See Findings "F", "G", "H", "L" and "N" (R. 42 and 44). It is idle to speak of the illegality of certain orders which were entered by consent of those who now complain. If in the future any order is entered which is in excess of the court's authority then the District can appeal.

Having read the opinion filed in the Circuit Court of Appeals, counsel filed a Petition for Rehearing (R. 59-60). Apparently they shifted from the position of "no jurisdiction" to that of jurisdiction with limitation as to the type of orders to be entered. In realty they have no complaint with any order entered by the District Court except those which apply moderate compulsion to the Commissioners and require them to do what every honest official would voluntarily do. They tried hard to persuade the Circuit Court of Appeals to modify its opinion by pronouncing those particular orders to be improper. The petition was overruled, and now counsel shift again and resume their original position.

Counsel say that a "splendid piece of constructive legislation in the interest of public economy * * * is being circumvented if not completely nullified by the invention of *deemed* receiverships and by expanding the mandatory injunctional process to cover the whole field of an ordinary receivership."

That is merely their criticism of the construction which the Supreme Court of Arkansas has given the Act. No Federal court is going to heedlessly expand the scope of the remedy beyond the limits fixed by the court which is entitled to speak with authority as to its meaning.

The question now presented is not one which justifies consideration by this Court.

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Counsel for Respondent

(9)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 537

KERSH LAKE DRAINAGE DISTRICT, ... *Petitioner,*

v.

STATE BANK & TRUST COMPANY
WELLSTON, MISSOURI, ... *Respondent.*

REPLY BRIEF FOR PETITIONER.

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PARAGON PRINTING CO., LITTLE ROCK

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Supreme Court of the United States

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No. 537

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ARGUMENT

The petition challenges the jurisdiction of the district court as a court of equity, and it also invokes the exercise of the supervisory power of this court.

The petitioner contends that a federal equity court is inherently without power to levy taxes, or to collect taxes already levied; and that a state statute cannot confer the legislative power of taxation on a federal equity court, or empower such a court to appoint receivers to administer the affairs of an improvement district for the purpose of collecting its taxes and paying its debts.

I

A federal court, as a court of equity, is without power to levy taxes, or to collect taxes already levied.

Counsel for the respondent say that the district court did not levy a tax in this case. That is a highly disputed question. But it is a wholly immaterial one, for a federal equity court is just as much without power to collect a tax already levied as it is without power to levy a tax. As said by this court:

> "We see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes."
>
> *Thompson* v. *Allen County*, 115 U. S. 550.

The brief filed by counsel for the respondent is absolutely silent about the power of a federal equity court to collect taxes. Apparently, counsel for the respondent concede that the only power of the district court in this case stemmed from Act 46 of 1933.

II

Act 46 of 1933 did not confer on the district court the extraordinary powers which it exercised in this case.

Counsel for the respondent say:

> "The Arkansas court has interpreted the statute as providing the equivalent of an equitable receivership. The district court has concluded that a federal court of equity may grant relief in accordance with Act 46 of 1933."

This is a crucial point in this case. The district court construed the act as conferring on it the full powers of an ordinary receivership for administering the affairs of the drainage district, including the collection of taxes, the allowance of claims, and the payment of debts. This was in exact accordance with the interpretation which counsel for the respondent have always put on the act. In their brief in the Supreme Court of Arkansas in *Johnosn* v. *Kersh Lake Drainage District,* 198 Ark. 743, the decision in which was affirmed by this court in *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485, counsel for the respondent said:

> "When the commissioners were made receivers of the court, the court took possession of all the assets of the district, which consisted of its assessment of benefits, and also of its record books of every kind."

And in the same brief counsel for the respondent also said:

> "The court below and this court are advised that this suit is not brought by the commissioners in their ordinary capacity, but as receivers of the United States court; and as receivers they stand on entirely different bases from that on which they would otherwise stand. As receivers of the federal court, they are not merely the commissioners of the district which are suing as such; but the suit is brought in aid of the jurisdiction of the federal court and for the purpose of collecting its judgment."

It ought not to require argument, or the citation of authorities, to show that a state legislative act cannot confer jurisdiction on a federal equity court to take possession of all the assests of a drainage district, including its assessment of benefits, and all of its records, and to compel the

collection of drainage taxes, not in suits by the commissioners as commissioners, as the state laws require, but by them "as receivers of the United States court". And it is preposterous to contend that Act 46 of 1933 conferred such jurisdiction on any court of equity, state or federal.

The district court not only exercised all the powers of an ordinary receivership in this case, but it went far beyond an ordinary receivership, as shown by the character of the orders referred to on page 24 of petitioner's original brief.

These orders are typical of the kind of orders which the federal equity courts are making every day in improvement district receiverships in Arkansas. They have now received the approval, implied if not expressed, of the Circuit Court of Appeals in this case. This fact led Judge Johnsen to sound a note of protest in a separate opinion filed by him. Judge Johnsen said:

> "I believe, however, that another note also should be struck. Under the mandatory injunction decree, which we affirmed in 92 F. 2d 783, the district court, in my opinion, could go no further than to compel the commissioners of the District to perform their statutory duties in tax collection and to make application of any properly available tax funds to the satisfaction of the previously entered judgment. The record before us indicates, however, that there have been ancillary orders entered by the district court which go beyond the scope of the power and the function which I have indicated, and it is these orders which have caused appellant to assume that the court was attempting to carry on a receivership of the District under its mandatory injunction decree, in violation of Act No. 46, Arkansas Acts of 1933 (Pope's Ark. Dig. sec. 4591), *Drainage District No.* 2 v. *Mercantile-Commerce Bank*

& Trust Co., 8 Cir., 69 F. 2d 138, and *Dickinson* v. *Mingea*, 191 Ark. 946, 88 S. W. 2d 807. I think it should be specifically stated that the affirmance now made carries no approbation of any such or similar orders and no warrant for a repetition of them" (Rec. 57).

Counsel for the respondent say that the orders which Judge Johnsen characterized as "beyond the scope of the power and the function" of the district court were made with the consent of the commissioners. That is the point of the situation, and that is also its evil. The commissioners were the court's receivers, and as such they were the servants of the court. Naturally, they consented, for they could not do otherwise, to any orders which the court might make. It was not for them to question the authority and power of their judicial master. Moreover, counsel for the respondent have always held an *in terrorem* over the commissioners. In one of their briefs they said:

> "If the defendants in the suit in the federal court (the commissioners) do not obey the mandatory injunction they will be imprisoned, and no state court could release them."

There was no occasion whatever for this threat, but the respondent, in furtherance of its purposeful postulate of the dominance of the federal district court over the tax proceedings in the state tribunals, suspended this Damoclean sword over the heads of the commissioners.

The result of the situation is that the landowners of the district, who have to bear the entire burden, are utterly helpless, for they are not parties to the suit, and have no right to become parties, and they cannot appeal from the court's orders, even if the orders were appealable. *Normandy Beach Development Co.* v. *Brown-Crummer In-*

vestment Co., 5 C. C. A., 69 Fed. (2nd) 105. As pointed out by the present court in a former case between these same parties:

> "These landowners were neither served with process nor heard in either the certificate holders' suit against the district or the mandatory injunction proceeding."
>
> *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, 60 Sup. Ct. 640.

In their brief, counsel for the respondent say:

> "If in the future any order is entered which is in excess of the court's authority, then the district can appeal."

This is of course incorrect. Appeals cannot be prosecuted from interlocutory orders except those relating to injunctions and the appointments of receivers as specially provided in section 129 of the Judicial Code, 28 U. S. C. A., section 227.

One of the purposes of the present proceeding is to obtain an adjudication that will stay the hand of the district court within its legitimate powers. One of the reasons assigned for the allowance of the writ is as follows:

> "The Circuit Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision."

III

A state statute cannot enlarge the equity jurisdiction of the federal courts, or obliterate the distinction between law and equity in such courts.

If Act 46 of 1933 creates an equitable remedy as broad as counsel for the respondent contend it created, and as broad as it was interpreted to be by the district court, the act creates a remedy which, for that very reason, a state legislature cannot confer on a federal equity court.

This question is fully argued in the petitioner's original brief. We add excerpts, however, from two cases decided by this court which are not referred to in that brief.

> "Whatever uncertainty may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, cannot enlarge the right to proceed in a federal court sitting in equity, and the federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have had in a state court."

Henrietta Mills v. *Rutherford County*, 281 U. S. 121, 50 Sup. Ct. 270.

> "The equity jurisdiction conferred on inferior courts of the United States by section 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by section 24 of the Judicial Code (28 U. S. C. A. sec. 41), is that of the English court of chancery at the time of the separation of the two counties. *Payne* v. *Hook*, 7 Wall. 425, 430, 19 L. Ed. 260; *In re Sawyer*, 124 U. S.

200, 209, 210, 8 S. Ct. 482, 31 L. Ed. 402. While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity, if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts where the legal remedy is adequate."

Matthews v. *Rodgers*, 284 U. S. 521, 52 Sup. Ct. 217.

IV

Collateral attack.

Counsel for respondent say that the district court, by granting relief, impliedly held that it had jurisdiction, and that the subsequent motion to dismiss for want of jurisdiction of the subject matter of the suit "constitutes a collateral attack on that decree". (Respondent's brief, 7 and 8.)

If the decree of the district court had been pleaded as *res judicata* in a suit between the same parties in another court, an attack on the decree, either on a jurisdictional or on any other ground, would be a collateral attack, and the cases cited by respondent would be applicable.

But the motion to dismiss in this case was filed in the court and in the cause in which relief was granted. As the motion challenged the jurisdiction of the court, as a court of equity, over the subject matter of the suit, it was not only a direct attack, but one expressly provided for in subdivision (h) of Rule XII of the Federal Rules of Civil Procedure: "That, whenever it appears that the court

lacks jurisdiction of the subject matter, the court shall dismiss the action." The authorities hold that the question of a lack of jurisdiction of the subject matter may be raised by a party at any stage of the proceeding until it is finally decided. It can be raised on appeal though it was not raised in the trial court, and it may be raised by an appellate court, and should be raised by such court, on the court's own motion.

This question is fully argued in the petitioner's original brief, and the authorities are cited.

In the present case, the petitioner raised the question in the district court. From an adverse decision it appealed to the Circuit Court of Appeals. That court declined to pass on the question, and hence this petition. It is certainly not a collateral attack.

Respectfully submitted,

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